

**BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION**

WANDA K. SHANNON

Claimant

VS.

U.S.D. 500

Self-Insured Respondent

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Docket No. 1,055,179

ORDER

STATEMENT OF THE CASE

Claimant appealed the November 26, 2012, preliminary hearing Order entered by Administrative Law Judge (ALJ) Kenneth J. Hursh. Mark Beam-Ward of Overland Park, Kansas, appeared for claimant. Frederick J. Greenbaum of Kansas City, Kansas, appeared for respondent.

The record on appeal is the same as that considered by the ALJ and consists of the transcript of the November 21, 2012, preliminary hearing and exhibits thereto; and all pleadings contained in the administrative file.

ISSUES

Claimant asserted she sustained a back injury as the result of a repetitive series of accidents and a right wrist injury as the result of a fall on February 11, 2011. At the preliminary hearing, claimant sought medical treatment for the back injury. Claimant's appeal concerns her back injury only. Respondent admitted claimant's right wrist injury arose out of and in the course of her employment, but not the back injury. ALJ Hursh determined claimant's date of accident for her alleged back injury was March 28, 2011, which means the Kansas Workers Compensation Act prior to May 15, 2011 (Old Act) applies. ALJ Hursh then denied claimant's request for medical treatment for her back, finding that claimant's back injury did not arise out of her employment with respondent.

Claimant's application for review indicated that she was appealing ALJ Hursh's Order, but provided no specifics. Claimant did not file a brief to the Board. The undersigned Board Member assumes that claimant is asking the Board to review the ALJ's

finding that claimant failed to prove she sustained a back injury by a series of repetitive accidents arising out of and in the course of her employment with respondent.

In its brief, respondent argues ALJ Hursh properly found that claimant's low back condition and disability were the result of natural aging and did not arise out of and in the course of her employment. Respondent did not contest ALJ Hursh's finding that claimant's date of accident was March 28, 2011, and asks the Board to affirm the ALJ's Order. At the preliminary hearing, respondent asserted that if this was an Old Act claim, then claimant did not give timely notice. However, respondent, in its brief, did not indicate timely notice was an issue. Therefore, this Board Member deems that issue is abandoned.

The issue before the Board is: Did claimant sustain a personal injury to her back through a series of repetitive accidents arising out of and in the course of her employment with respondent?

FINDINGS OF FACT

After reviewing the record compiled to date and considering the parties' arguments, the undersigned Board Member finds and concludes:

Claimant has had an extensive history of back issues. On January 7, 2004, claimant underwent an MRI of the lumbar spine at Leavenworth-Kansas City Imaging PA. Dr. Jeffrey L. Borders reviewed the MRI and his impression was degenerative joint disease and degenerative disc disease in the lumbar spine, most prominently at L4-5 with a mild degree of spinal stenosis at that level. A second MRI was conducted at Leavenworth-Kansas City Imaging PA on February 18, 2005. The MRI showed mild lumbar spondylosis most evident at L4-5 with unchanged grade-1 degenerative anterolisthesis. There was no evidence of a disc herniation and no significant changes since claimant's 2004 MRI. A third MRI image taken on April 18, 2007, at Leavenworth-Kansas City Imaging PA revealed a broad-based central left-sided disc protrusion at L4-5 with associated grade-1 spondylolisthesis and markedly hypertrophic facet degenerative changes that produced central spinal stenosis and an element of lateral recess stenosis.

Claimant testified that for 25 years, her family doctor has been Dr. Anil Gosalia. Dr. Gosalia's records that were placed into evidence indicated claimant first complained of back pain on January 9, 2004. Dr. Gosalia's notes from February 19, 2004, indicated claimant had lumbar pain and that Lortab, Mobic and Skelaxin were prescribed. Claimant saw Dr. Gosalia for back pain numerous times from August 18, 2004, through February 24, 2011. From January 9, 2004, through 2006, claimant was on muscle relaxants and pain medications. During that time period, Dr. Gosalia's impressions nearly always included low back pain or chronic low back pain. None of Dr. Gosalia's records indicated that claimant's back condition was work related.

Dr. Gosalia referred claimant to neurosurgeon Dr. Robert M. Beatty, who saw claimant on March 9, 2005. His notes from that visit indicated claimant was a custodian and was having pain across her back and hips. On June 27, 2007, Dr. Beatty indicated claimant was on her feet quite a bit. Claimant had noticed increased pain across her back into her legs. Standing and walking in claimant's job was uncomfortable for her. Dr. Beatty recommended claimant undergo a lumbar decompression with an endoscopic procedure at L4-5. Dr. Beatty performed an L4-5 laminotomy bilaterally and medial facetectomy and foraminotomy with lumbar microdissection at Providence Medical Center on August 16, 2007. In a letter dated September 19, 2007, to Dr. Gosalia, Dr. Beatty indicated claimant could return to work on October 1, 2007.

On May 14, 2009, claimant underwent another lumbar MRI at Leavenworth-Kansas City Imaging PA that revealed postoperative changes at L4-5, grade-1 spondylolisthesis and a disc bulge at L4-5 with enhancing scar tissue in the lateral recesses at the operative site. Another lumbar MRI was conducted at Diagnostic Radiology Institute of Kansas City on February 1, 2010. The impressions of Dr. John Pope, who read the MRI, were: (1) predominantly lower lumbar spondylosis, mild, with associated mild central canal stenosis at L4-5 resultant from disc bulge and possible spondylolysis and (2) mild bilateral L4-5 and L5-S1 neural foraminal narrowing.

Claimant underwent yet another lumbar MRI at Diagnostic Radiology Institute of Kansas City on January 21, 2011. The impressions of the physician who read the MRI were: (1) central and lateral stenosis at L4-5 similar to the MRI on February 1, 2010, due to disc bulging, facet ligamentum flavum hypertrophy and grade-1 anterolisthesis; (2) mild degenerative disc change at L5-S1, without stenosis and (3) facet degenerative changes throughout the lumbar spine, most severe at L4-5 and L5-S1 bilaterally.

Claimant testified that her medical treatment by Drs. Gosalia and Beatty, and medications prescribed by them, were paid for by health insurance. Nevertheless, claimant also indicated that the pain in her back has been aggravated or accelerated as the result of performing her custodial duties for respondent.

Claimant worked for respondent as a custodian from 2006 until January 3, 2012. Claimant left her employment with respondent because of treatment for breast cancer. Her job duties included cleaning classrooms, pulling trash, sweeping and mopping. The school claimant worked in did not have an elevator. Consequently, claimant had to carry any trash that was collected upstairs. During the summers, all furniture, such as desks and file cabinets, was moved from the classrooms into the hallway and the floors were stripped and refinished. The equipment claimant used included buffers, scrubbers and mop buckets. All furniture and equipment would be moved via the stairs. Claimant would have to tip over the 55-gallon trash cans and pull out the liners filled with trash. She testified that her job required the use of all body parts and required her to bend, squat and lift.

On February 11, 2011, claimant fell on ice at work and injured her right wrist. Claimant testified that she went to the emergency room at Providence Medical Center the same day and complained about her right wrist and about her back. X-rays taken on February 12, 2011, of claimant's lumbar spine showed facet arthropathy with spondylolisthesis L4 on L5, mild scattered marginal spurring, but no evidence of acute fracture, dislocation or misalignment.

When she first began working for respondent, claimant was able to work continuously throughout the day. After the 2007 surgery, claimant's back pain kept getting worse. Claimant testified, "Well, when I was at work, the more I was bending and doing my duties, the job I was performing, the worse the pain got."¹ She indicated that, "I'd go to work and work as far as I could and then I'd go into a classroom, take a pain pill and sit down and regroup until I could get up and move again."² Claimant's back pain would be worse during the week compared to the weekend, when she was not working. Claimant testified that from March 2011 to January 2012, she did not perform her job duties as she should have because of back and leg pain.

At the request of her attorney, on July 19, 2011, claimant was evaluated by neurological surgeon Dr. E. Jerome Hanson, Jr. He physically examined claimant, obtained a history from her and reviewed all of her medical records back to August 2002. On November 2, 2011, Dr. Hanson completed a detailed report concerning claimant's wrist and back conditions. Dr. Hanson opined that following claimant's 2007 surgery, she continued to have evidence of symptomatic lumbar spinal stenosis, lateral recess stenosis, foraminal stenosis, and probable right L5 or S1 radiculopathy with signs of neurological deficit and evidence of nerve root irritation. He indicated claimant's subsequent MRIs demonstrated evidence of ongoing compression at L4-5 and L5-S1 of components of the cauda equina and/or exiting lumbar nerve roots with associated signs of nerve root irritation and focal neurological deficit. Dr. Hanson felt claimant was not at maximum medical improvement.

Dr. Hanson recommended additional MRI studies, a post-contrast lumbar CT myelography, electromyographic assessment or other studies. It was Dr. Hanson's subjective opinion that claimant would require an extensive decompressive laminectomy of L4-5 with bilateral foraminotomies of the L4-5 and L5-S1 neuroforamina. Dr. Hanson opined that, "Based on her explanation of her work-related activities, it is more likely than not, to a reasonable degree of medical probability or certainty, that her job-related activities including lifting and carrying and emptying heavy waste receptacles contributed to, accelerated, or aggravated her underlying lumbar spine pathology."³

¹ P.H. Trans. at 11.

² *Id.*, at 9.

³ *Id.*, Cl. Ex. 1 at 11.

At the November 21, 2012, preliminary hearing, claimant testified she was still taking the same medications. Occasionally, Dr. Gosalia would give her shots. The last injection, which claimant believed was a steroid, was given to her by Dr. Gosalia a month earlier.

ALJ Hursh gave the following reasons for finding claimant's injury did not arise out of her employment with respondent:

The claimant's low back condition as evidenced on MRIs did become marginally worse throughout her six years working for the respondent, but the claimant also aged six years in that time frame. Essentially, she came to work for the respondent with a bad back and left work for the respondent six years later with a slightly worse back. She did not leave the employment because of back problems and did not pursue treatment for back problems under workers compensation while she was employed there. The allegation of a repetitive back injury did not surface until it was added on to an application for hearing filed soon after the claimant suffered a traumatic injury to her wrist. Looking at all the evidence and circumstances, this appears to be a case of degenerative disk disease worsening over time, and the fact that some of that time was spent at work does not show a causal connection between the work performed and the claimed injury. This is more a *[sic]* likely a case of disability from natural aging which is not considered an injury arising out of employment according to K.S.A. 44-508(e).⁴

PRINCIPLES OF LAW AND ANALYSIS

A claimant in a workers compensation proceeding has the burden of proof to establish by a preponderance of the credible evidence the right to an award of compensation and to prove the various conditions on which his or her right depends.⁵ A claimant must establish that his or her personal injury was caused by an "accident arising out of and in the course of employment."⁶ The phrase "arising out of" employment requires some causal connection between the injury and the employment.⁷

K.S.A. 2010 Supp. 44-508(e) states:

"Personal injury" and "injury" mean any lesion or change in the physical structure of the body, causing damage or harm thereto, so that it gives way under the stress of the worker's usual labor. It is not essential that such lesion or change be of such character as to present external or visible signs of its existence. An

⁴ ALJ Order (Nov. 26, 2012) at 2.

⁵ K.S.A. 2010 Supp. 44-501(a); *Perez v. IBP, Inc.*, 16 Kan. App. 2d 277, 826 P.2d 520 (1991).

⁶ K.S.A. 2010 Supp. 44-501(a).

⁷ *Pinkston v. Rice Motor Co.*, 180 Kan. 295, 303 P.2d 197 (1956).

injury shall not be deemed to have been directly caused by the employment where it is shown that the employee suffers disability as a result of the natural aging process or by the normal activities of day-to-day living.

ALJ Hursh found that after working for respondent for six years, claimant left with a “slightly worse back.” The issue is whether claimant proved her “slightly worse back” was the result of her repetitive work activities or from the natural aging process. It is mystifying that claimant’s attorney filed a generic appeal and failed to file a brief in support of claimant’s appeal. Nonetheless, the Board is obligated to look at the evidence in the claim and applications for review and briefs are not evidence.

Claimant testified without contradiction that her work activities caused her back to worsen following her 2007 back surgery. Her job required her to move heavy items, often up stairs as the building she worked in had no elevator. Dr. Hanson exhaustively reviewed all of claimant’s medical records, took a history from claimant and physically examined her. He opined that within a reasonable degree of medical probability, claimant’s job-related activities including lifting and carrying and emptying heavy waste receptacles contributed to, accelerated or aggravated her underlying lumbar spine pathology. Dr. Hanson’s causation opinion is uncontroverted by any other medical expert. It is well settled that prior to May 15, 2011, a work-related injury was compensable even where the accident only aggravated or accelerated a preexisting condition.⁸ This Board Member concludes that claimant’s testimony, coupled with Dr. Hanson’s causation opinion, satisfies claimant’s evidentiary burden at this juncture of the proceedings that her preexisting back condition was aggravated or accelerated by her work activities.

By statute the above preliminary hearing findings are neither final nor binding as they may be modified upon a full hearing of the claim.⁹ Moreover, this review of a preliminary hearing Order has been determined by only one Board Member, as permitted by K.S.A. 2011 Supp. 44-551(i)(2)(A), as opposed to being determined by the entire Board when the appeal is from a final order.¹⁰

WHEREFORE, the undersigned Board Member reverses the November 26, 2012, preliminary hearing Order entered by ALJ Hursh by finding that claimant sustained a personal injury to her back by a repetitive series of accidents arising out of and in the course of her employment with respondent. This Board Member remands this matter to ALJ Hursh for further proceedings and orders consistent with this Order.

⁸ *Harris v. Cessna Aircraft Co.*, 9 Kan. App. 2d 334, 678 P.2d 178 (1984); *Demars v. Rickel Manufacturing Corporation*, 223 Kan. 374, 573 P.2d 1036 (1978); *Chinn v. Gay & Taylor, Inc.*, 219 Kan. 196, 547 P.2d 751 (1976).

⁹ K.S.A. 2011 Supp. 44-534a.

¹⁰ K.S.A. 2011 Supp. 44-555c(k).

IT IS SO ORDERED.

Dated this ____ day of January, 2013.

THOMAS D. ARNHOLD
BOARD MEMBER

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Kenneth J. Hursh, Administrative Law Judge